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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MILTON BARNES, Defendant and Appellant.	B290009 (Los Angeles County Super. Ct. No. NA101838)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Affirmed.

G. Martin Velez, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Appellant Milton Barnes appeals from the trial court's revocation of his probation and imposition of a previously suspended sentence of six years for a robbery to which he pled no contest. The trial court denied appellant's request for a certificate of probable cause, and his appointed counsel filed an opening brief that raised no issues and requested independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

Appellant filed four supplemental briefs in which he argues that he should have received additional custody credit for time he spent in residential treatment facilities. We conclude that appellant has not carried his burden of showing that his time at the facilities was due to his conviction or that the facilities were sufficiently restrictive to constitute "custody." Our independent review of the record did not reveal any other arguable issues. We accordingly affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant pled no contest to second degree robbery (Pen. Code, § 212.5, subd. (c))[1] in connection with an incident in which he stole items from a grocery store and hit the store's loss prevention officer in the face with his arm. Appellant also admitted seven prior convictions. On June 30, 2015, the trial court sentenced appellant to the high term of five years for the robbery and one additional year for one of his prior convictions. The court suspended the sentence and placed appellant on five years of formal probation, with the condition that he was "to spend the first year" in the Midnight Mission residential drug treatment program, "not any other."

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

On August 3, 2016, the trial court summarily revoked appellant's probation. The court reinstated probation two days later, on August 5, 2016, "on the same terms and conditions," but released him into a different treatment program, the Union Rescue Mission, in which he had enrolled the previous day, August 4, 2016.

On December 30, 2016, the trial court summarily revoked appellant's probation a second time. Appellant next appeared before the court on June 21, 2017, apparently in connection with a different charge. On July 13, 2017, the court held a probation revocation hearing, at which it noted that appellant "took 16 months in another case in Orange County." After being advised of his right to a full hearing, appellant admitted that he violated probation. The court thus imposed the suspended sentence of six years, which it ran concurrent with the 16-month sentence in the Orange County case. The court credited appellant with 23 days of actual credit and 23 days of good time/work time credit, for a total of 46 days.

On July 26, 2017, appellant appeared in court for a "credit review" hearing. His attorney informed the court that appellant "was at the Midnight Mission for 246 days under court order and then at the Union Rescue Mission for 10 days under court order." Counsel further represented that appellant "attended the Lamp Program and Winn Gardens [*sic*]," but it does not appear from the record that he informed the court of the amount of time appellant may have spent in those programs.

The court awarded appellant an additional 256 days of credit for the court-ordered time he spent at the Midnight Mission and the Union Rescue Mission. It advised appellant that

"[t]hose days do not have good time/work time credit," and further told him, "I can't give you credit" for "[t]he stuff that you did on your own." The abstract of judgment filed on August 4, 2017 stated that appellant had been awarded a total of 302 days of credit: 279 days of actual credit (the original 23 plus the additional 256) and 23 days of custody credit.

In a document dated October 29, 2017 and filed January 2, 2018, appellant, acting in propria persona, requested modification of his sentence pursuant to section 1170, subdivision (d). He asserted that he had "reluctantly and erroneously admitted to violence" in connection with his no contest plea to secure his entry into a drug treatment program, and asked the court to consider a low-term sentence rather than the high-term one it had imposed. He also asked the court to remove the one-year enhancement, and to reclassify the conviction as a non-strike offense.

Appellant also requested the following additional custody credit: "Midnight Mission for 10 months 18 days; Weingart Program 2 months; Union Rescue Mission 2 months; Lamp Community A Mental Health Program 2 1/2 months." Appellant asserted that he was enrolled in the above programs from his original probation date of June 30, 2015 through October 27, 2016, when he was arrested in connection with the Orange County case. He requested "additional pre-sentence credits of 9 months to reflect the additional time in residential programs." Appellant specifically requested an additional 78 days of credit for the time he spent in the Midnight Mission; he claimed he "was only given 8 months (256 days) for Midnight Mission, when in fact he was in that program 10 mts 18 days totaling 334 days." Appellant did not provide any documentation in support of his

request for additional custody credit.

The trial court heard appellant's motion on January 2, 2018. It issued a written ruling concluding that it lacked jurisdiction to grant relief because the request was made outside of the 120-day time limit set forth in section 1170, subdivision (d). The court added, "[p]arenthetically, even if the court did have jurisdiction, the request would be denied."

On May 14, 2018, the California Appellate Project filed a motion for relief from default on appellant's behalf. The motion represented that appellant placed a timely notice of appeal and request for certificate of probable cause in the prison mail on September 10, 2017, but that the notice of appeal had not been properly delivered or processed. The motion was accompanied by a request for judicial notice and various supporting documents, including a declaration from appellant. We granted the request for judicial notice and the motion for relief and filed appellant's notice of appeal on June 8, 2018.

We referred appellant's request for a certificate of probable cause to the trial court. In that request, appellant raised the same issues he presented in his motion for sentence modification. With respect to the custody credits, he asserted that he should have received "a total of 463 actual days" calculated as "Midnight Mission—315 days," "Weingart 40 days," "Union Rescue Mission 65 days" and "Lamp 43 days." He did not attach any documentation supporting these assertions. The trial court denied the request for a certificate of probable cause on June 15, 2018.

We appointed counsel for appellant on September 19, 2018. After obtaining augmentation of the record, appellant's counsel filed a *Wende* brief on December 19, 2018. We sent appellant a

letter on December 21, 2018 informing him of the nature of the brief that had been filed and advising him that he had 30 days to file a supplemental brief setting forth any issues he wished us to consider.

Appellant filed four supplemental briefs, on December 28, 2018, January 4, 2019, January 8, 2019, and January 25, 2019, before the cause was submitted on March 14, 2019. All four supplemental briefs concern the calculation of appellant's custody credit.

DISCUSSION

I. The appeal may proceed without a certificate of probable cause.

We note at the outset that appellant's lack of a certificate of probable cause does not foreclose his challenges to his custody credit. "Presentence custody credit issues do not require a certificate of probable cause. Instead, a defendant must raise the issue at sentencing, or upon later discovery of miscalculation, by a motion for correction of the record in the trial court. (§ 1237.1.) If the error is not corrected by the trial court, defendant may appeal the issue without a certificate of probable cause." (*People v. Hodges* (2009) 174 Cal.App.4th 1096, 1102 & fn. 5.) Here, appellant challenged the calculation of his presentence custody credit both shortly after his sentencing and in a later filed motion. We accordingly consider the issues presented in appellant's supplemental briefs.

II. Appellant's contentions

A. First supplemental brief

In appellant's first supplemental brief, he contends that he spent 300 days at Midnight Mission, "approximately-69 days" at Weingart, 35-60 days at Union Rescue Mission, and 120 days at

Lamp, to which he also refers as "The People Concern." Attached to the brief is a letter appellant wrote to his appointed counsel explaining the reasons for possible discrepancies in his Midnight Mission records, and requesting that counsel obtain documentation from all four of the facilities he identified. Also attached is a declaration in which appellant asserts that he should have received an additional 384 days of custody credit.

Appellant additionally attached two letters to this brief. The first, on "The People Concern" letterhead, is dated November 28, 2018. It states that appellant "resided in the Village Shelter program from 8/27/2016 to 12/28/2016. The Village shelter [*sic*] is an emergency shelter program, offering services including interim housing, permanent housing placement, mental health and substance use programs. [¶] During Milton's stay, he was assigned a case manager who began assisting him with applying for permanent housing through CES, and acquiring transportations [*sic*] services, based on his needs." The second is an email Weingart Center for the Homeless sent to appellant's appointed counsel on November 29, 2018. It states: "After reviewing our client files, we found that Mr. Barnes. . . was NOT a resident at our facility during the time in question (6/1/2016—7/10/2016). [¶] Mr. Barnes was a resident here during the following dates: [¶] 3/10/2016—3/14/2016—Winter Shelter Program. [¶] 3/15/2016—3/30/2016—Open Door Program. [¶] 3/31/2016—5/19/2016—Open Door Program."

B. Second supplemental brief

In his second supplemental brief, appellant contends that his appointed counsel failed to contact the four programs in which appellant claims to have participated. He requests that we order his counsel to "re-investigate the case" to obtain

information from all of the programs, or appoint new counsel for him. He further contends that he should have received a total of 506 days of custody credit rather than the 256 days the court awarded him, which he states was "only . . . for Midnight Mission." He attached two copies of the 11/28/2018 letter from The People Concern.

C. Third supplemental brief

In his third supplemental brief, appellant asserts that he should have received an additional 69 days of credit for time spent at Weingart, 121 days of credit for time spent at Lamp (The People Concern), and 60 days of credit for time spent at Union Rescue Mission. He states that "the 256 days granted on 7-26-17 is the time spent at Midnight Mission—240 days + 15 days good time credit. For a total of 256 days." He again requests that we ask his counsel to "re-evaluate his findings which are clearly an error" or "appoint another attorney who will fully look at the given evidence and documents." The 11/28/2018 letter from The People Concern and the November 29, 2018 email from the Weingart Center are attached to the brief.

D. Fourth supplemental brief

In his fourth supplemental brief, appellant again requests removal of appointed counsel and his replacement "with another attorney that can thoroughly investigate the overlooked pre-sentence/post-sentence credit, which is evident by verification letters from Lamp (People's [*sic*] Concern) dated 11-28-18 (121 days) and Weingart dated 11-29-18 69 days." He does not mention Union Rescue Mission and requests a total award of 446 days of credit rather than the 506 requested in his earlier filings. The 11/28/2018 letter from The People Concern and the November 29, 2018 email from the Weingart Center are attached

to the brief.

III. Legal principles governing custody credits

"Everyone sentenced to prison for criminal conduct is entitled to credit against his term for all actual days of confinement solely attributable to the same conduct." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) Section 2900.5, subdivision (a) provides that a convicted person "shall be credited" with credit against his or her sentence of imprisonment for all days spent in custody, including time spent in a "rehabilitation facility . . . or similar residential institution," "including days served as a condition of probation in compliance with a court order." As this plain language suggests, "[t]he provisions of Penal Code section 2900.5 . . . apply to custodial time in a residential treatment facility as well as straight county jail time." (*People v. Jeffrey* (2004) 33 Cal.4th 312, 318.)

Entitlement to credits for time spent in a residential treatment facility "depends on whether such participation was a condition of probation for the same underlying criminal conduct." (*People v. Davenport* (2007) 148 Cal.App.4th 240, 245.) "'It is not the procedure by which a defendant is placed in a facility that determines the right to credit, but the requirement that the placement be "custodial," and that the custody be attributable to the proceedings relating to the same conduct for which the defendant has been convicted. [Citations.] Courts have given the term "custody" as used in section 2900.5 a liberal interpretation.' [Citation.]" (*Ibid.*)

Whether a particular facility is sufficiently restrictive to constitute "custody" is a question of fact. (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1922.) Factors relevant to the determination include the extent to which freedom of movement

is restricted, the extent of regulations governing visitation, the facility's rules regarding personal appearance and other conduct, and the rigidity of the program's daily schedule. (*Id.* at p. 1921.) Restrictive residential treatment facilities may be found custodial. (See *People v. Rodgers* (1978) 79 Cal.App.3d 26, 31.) A defendant bears the burden of demonstrating his or her entitlement to presentence custody credit. (*People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1258.)

IV. Appellant did not carry his burden.

On July 26, 2017, the trial court amended its original judgment to award appellant an additional 246 days of custody credit for the time he spent at the Midnight Mission and 10 days of custody credit for the time he spent at Union Rescue Mission. Appellant contends that he also should have received 121 days for the time he spent at Lamp/The People Concern, and 69 days for the time he spent at the Weingart Center; he appears to have abandoned his contention that he spent 60 days at Union Rescue Mission.

The letters he attached to his briefs do not demonstrate that appellant is entitled to additional custody credit. Neither letter shows that appellant enrolled in the programs pursuant to an order of the court or in connection with his conviction or probation. The remainder of the appellate record likewise provides no suggestion that appellant participated in these programs as a result of his conviction. "[A] prisoner is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the sole reason for his loss of liberty during the presentence period." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191.) That showing was not made here.

The record also contains no information demonstrating that these programs were "custodial" or restrictive in nature. The letter from The People Concern states that appellant utilized its "emergency shelter" program, which is not suggestive of either mandatory enrollment or restrictive conditions. Similarly, the email from the Weingart Center indicates that appellant utilized its "Winter Shelter" and "Open Door" programs, which again suggest that appellant was free to leave. Without more, we cannot conclude that the trial court erred in awarding appellant a total of 302 days of custody credit.

Appellant's request for replacement counsel is denied. The email from the Weingart Center was addressed to counsel, indicating that he investigated appellant's claims. The letter from The People Concern is addressed more generally—"To Whom It May Concern"—but was sent to a fax machine, again indicating counsel's involvement in obtaining it.

V. *Wende* Review

We have independently reviewed the entire record. We are satisfied that no arguable issues exist and appellant has received effective appellate review of the judgment entered against him. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-279; *People v. Kelly* (2006) 40 Cal. 4th 106, 123-124.)

DISPOSITION

The judgment is affirmed.

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COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.